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Supreme Court, U.S.
FILED
AUG 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2040

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
ROCKWOOD SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *ET AL.* AND RESPONDENTS EARLINE CALDWELL, *ET AL.*

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QUESTION PRESENTED

Whether a court order pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977), requiring State officials to help fund desegregation remedies as part of a series of orders requiring State officials to help remedy the vestiges of *de jure* school segregation which State officials helped to cause, presents an issue warranting review, particularly where the Court of Appeals has previously rejected State officials' objections to such orders and this Court has previously denied certiorari.

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Petitioners State of Missouri and certain State officers (hereinafter "Petitioners" or "State defendants") have asked this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 4, 1988, in *In re: Liddell v. Board of Education of City of St. Louis*, 839 F.2d 400. On four previous occasions, this Court has denied requests to review earlier decisions in this case raising issues similar to those raised again by the State defendants here. Because the decision below is correct and does not raise any questions warranting review by this Court, respondents Board of Education of the City of St. Louis, Missouri, its members, officers, and administrators (hereinafter "City Board") and

respondents Earline Caldwell, Liddie Caldwell, Denise Daniels, Dwayne Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Robert Smith, Eddie S. Willis, and the National Association for the Advancement of Colored People (hereinafter "Caldwell respondents") urge this Court to deny the State defendants' petition.

STATEMENT OF THE CASE

Notwithstanding the State defendants' efforts to separate the instant petition from the remainder of this case, the decision below is part of a continuing effort since 1980 to remedy school segregation in St. Louis and to require the State defendants to comply with constitutional standards. As discussed below, both this Court and the courts below have consistently rejected the efforts of the State defendants to resist the court orders requiring them to help remedy the school segregation they helped to cause in St. Louis.

Previous St. Louis desegregation orders and attempts to obtain Supreme Court review

In 1980, after an extensive trial in which the State participated, the Eighth Circuit held that the State and the City Board had failed to discharge their constitutional duty to eliminate the vestiges of the *de jure* racially dual school system in the City of St. Louis. The court found that, as a consequence of these constitutional violations, 77% of the city schools remained more than 90% one-race. *Adams v. United States*, 620 F.2d 1277, 1285 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980).

The Court of Appeals recognized that any feasible remedy limited to mandatory reassignment of students within the St. Louis city district could not effectively desegregate the city schools and remove the vestiges of the dual system, and that under any practical alternative, some

black St. Louis students would remain in one-race schools. *Id.* at 1296. The appellate court thus directed the trial judge to consider the use of other remedial techniques, including the implementation of compensatory and remedial educational programs pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*), and voluntary student exchanges with suburban school districts. *Adams v. United States*, *supra*, 620 F.2d at 1296-97.

On remand, the District Court conducted additional hearings, in which the State fully participated, and ordered the implementation of an initial desegregation plan for 1980-81. The District Court also ordered the State defendants and the City Board to develop and submit additional desegregation proposals, such as a plan for voluntary student exchanges between the city school district and the surrounding St. Louis county school districts. *Liddell v. Board of Education*, 491 F. Supp. 351, 353 (E.D. Mo. 1980) (paragraph 12(a)), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981). Among its other findings, the District Court specifically held that the State was a "primary constitutional wrongdoer" with respect to the "segregated conditions in the St. Louis public schools," and ordered that the State defendants and the City Board pay the cost of desegregation remedies. *Id.* at 359-360. The State defendants appealed, protesting the order that they help pay the costs of desegregation remedies. The Eighth Circuit affirmed the District Court's order in all respects, and this Court denied certiorari. 454 U.S. 1081 (1981).

The District Court proceeded to order further implementation of the relief it outlined in 1980 in order to continue the process of eliminating the vestiges of school segregation in St. Louis. This included an order that the state defendants pay transportation and related costs of a voluntary interdistrict transfer plan that had been developed pursuant to paragraph 12(a) of the 1980 order, under which black city students and white county

students from districts who chose to take part could participate in voluntary interdistrict transfers. The State defendants appealed. As in 1981, the Eighth Circuit rejected the State defendants' arguments and affirmed the District Court, noting that "30,000 black students still attend[ed] all-black schools" in St. Louis. 677 F.2d at 628. As in 1981, this Court denied certiorari. 459 U.S. 877 (1982).

In 1981, the Caldwell respondents and the City Board filed motions to add suburban districts to the litigation and to bring claims for interdistrict remedies. These claims contended that the suburban districts, in conjunction with the State, had created and perpetuated a racially dual, metropolitan-wide structure of public education justifying the implementation of a mandatory metropolitan desegregation remedy. Shortly before trial of the interdistrict claims in 1983 ,a settlement agreement was reached with all 23 St. Louis County suburban districts. Based on the settlement agreement, and on extensive hearings in which the State defendant fully participated, the District Court entered a comprehensive desegregation order in July, 1983, containing desegregation measures that build upon the Paragraph 12(a) voluntary plan and the 1980 desegregation order. *Liddell v. Board of Education*, 567 F. Supp. 1037 (E.D. Mo. 1983), *modified and aff'd*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984).

The 1983 settlement agreement and order were designed to give black students attending one-race schools in the city a choice between transferring to predominantly white schools in suburban districts or attending schools in the city in which the vestiges of segregation would be removed to the maximum extent practicable. Like the paragraph 12(a) plan, the 1983 plan provides for voluntary interdistrict transfers between city and suburban district schools. To attract suburban students to the city, and to provide additional relief for black city

students, the plan also includes magnet schools, remedial and enrichment programs in city schools, part-time integrative programs, teacher exchanges between the city and the suburb, and special educational improvements for black city students remaining in one-race schools. The costs of the plan were to be paid for by the City Board and the State defendants, based on their established liability for segregation in the St. Louis city schools. The State again protested that it should not be required to participate in and help fund desegregation as ordered by the District Court. The Court of Appeals affirmed the District Court's order with modifications, and this Court again denied certiorari. 469 U.S. 816 (1984).

In the present petition, the State defendants claim that no substantive relief has been ordered against them, and that they have been required only to help pay the costs of desegregation in St. Louis. In fact, however, the District Court's orders impose significant substantive desegregation obligations on the State defendants in addition to requiring them to help fund desegregation remedies. For example, the 1983 order and settlement plan required the State defendants to provide transportation services to students taking part in interdistrict transfers or part-time integrative programs, to participate in the administration of the interdistrict transfer program through the voluntary Interdistrict Coordinating Council created by the plan, and to participate in the planning, administration, and evaluation of magnet programs through the plan's Magnet Review Committee.[1] The

[1] *See Liddell v. Board of Education, supra*, 567 F. Supp. at 1055 (ordering State defendants to comply with applicable provisions of Settlement Plan); Settlement Agreement, Sections III-C, III-D, VIII, IX-A, IX-B, reprinted in the appendix ("App.") to the Petition for a Writ of Certiorari ("Pet.") at A-168-170, A-206-208 (describing specific State functions under Settlement Plan). *Accord, e.g., Liddell v. Board of Education, supra*, 731 F.2d at 1323 (explaining responsibility of State and other representatives on Coordinating Council to "coordinate and administer the student

courts below repeatedly have urged the State defendants to take part in the desegregation plan "on a cooperative rather than an adversary basis." *Liddell v. Board of Education, supra*, 677 F.2d at 628. As the Court of Appeals recently noted with respect to magnet schools, however, even though the State defendants have "an obligation to work together" with the City Board and other parties in "planning and operating" desegregation remedies, the State defendants have "mainly reacted to the City Board's proposals, usually negatively." *Liddell v. Board of Education, supra*, 801 F.2d at 282.

Despite such obstacles, progress has been made since 1983. For example, as of 1987-88, almost twelve thousand black students from the City attend schools voluntarily in the suburbs pursuant to the interdistrict transfer program. *See* App. at A-5. Even this figure, however, is thousands of students short of the number of interdistrict transfers sought to be achieved by the 1983 order, with the result that more than 19,000 black city students still remain in one-race schools. *Id.*; Desegregation Monitoring and Advisory Committee Report L(1718)87 (Dec. 17, 1987) at 5. The City Board and the Caldwell respondents continue to seek to eliminate the remaining vestiges of segregation in St. Louis, and continue to urge the State defendants to cooperate in doing so.

The State defendants' current attempt to obtain Supreme Court review

This petiiton concerns a decision by the court below requiring the State to further desegregation in St. Louis by paying certain costs incurred by suburban districts in accommodating voluntary transfer students from the City

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transfers, the voluntary teacher exchanges and the part-time educational programs"); *Liddell v. Board of Education*, 801 F.2d 278, 282 (8th Cir. 1986) (noting that "representatives of the State must be involved in the planning process for curriculum, facilities, and transportation, and in the recruitment process" for magnet schools).

pursuant to the 1983 desegregation plan. This order was based on Section X.B.3. of the 1983 settlement agreement, which was approved on appeal and specifically provides for reimbursement of a suburban district's "one-time extraordinary costs (other than hiring of personnel) such as the costs associated with reopening a closed school" in connection with the interdistrict transfer plan. *See* App. A-5, A-220.

Pursuant to this provision, the Court of Appeals ruled that the State should be ordered to pay for some of the costs of reopening a closed elementary school in one suburban district and to help pay the costs of building more classroom space to accommodate interdistrict transfer students in another district. App. at A-5. The court explained that it was approving State payment only for "these non-recurring costs incurred as a result of the presence of the transfer students," and only "to the extent existing and newly transferred students cause the need for new space." App. at A-16, A-13. The Court of Appeals issued its decision on February 4, 1988, and denied the State defendants' petitions for rehearing and for rehearing *en banc* on March 14, 1988. The State's current petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

1. The State defendants claim that the order below, and presumably all court orders since 1980 which have required the State defendants to help bear the costs of desegregation in St. Louis, violate the Eleventh Amendment. In fact, however, this Court has already ruled in *Milliken II* that the Eleventh Amendment permits the federal courts to order that State officials help pay the costs of remedying segregation for which they are partially responsible.

In *Milliken II*, as in this case, State officials were found responsible for constitutional violations which contributed to segregation in city schools. *Milliken II*, 433 U.S. at

269. In *Milliken II*, as in this case, the District Court ordered implementation of remedies in addition to mandatory student assignment to help eliminate the vestiges of segregation, and ordered State officials found liable for helping cause segregation to help pay for the costs of such remedies. *Id.* at 273-277. Both the Court of Appeals and this Court affirmed. In its opinion in *Milliken II*, moreover, this Court specifically rejected the State officials' assertion that "the requirement that the state defendants pay" part of the costs of desegregation remedies "violates the Eleventh Amendment." *Id.* at 288.

As this Court explained in *Milliken II*, a decree requiring State defendants found responsible for helping cause segregation to help pay desegregation-related costs "fits squarely within the prospective-compliance exception" to the Eleventh Amendment. *Id.* at 289. That exception, the Court held, authorizes the federal courts to require State officials to help "eliminate from the public schools all vestiges of state-imposed segregation" by supporting desegregation-related remedies, "notwithstanding a direct and substantial impact on the State treasury." *Id.* at 289, 290. Based on *Milliken II*, the court below has twice rejected the State defendants' claims that orders requiring them to help fund desegregation remedies in this case somehow violate the Eleventh Amendment. *See* App. at A-11; *Liddell, supra*, 731 F.2d at 1308 n.13 (reprinted at App. at A-71 n.13).

The State defendants have failed to offer any basis for reconsidering their rejected Eleventh Amendment claims. The State appears to suggest that *Milliken II* is distinguishable because State officials in that case were ordered to participate in implementing desegregation remedies, and the payment of funds was merely "ancillary" to those obligations. Pet. at 14. In fact, however, the precise issue presented in *Milliken II* was whether the Eleventh Amendment permits a federal court to "re-

quire state officials found responsible for constitutional violations to bear part of the costs" of remedying them, and it was clear that the State's "basic complaint concern[ed] *money*," not other issues. *Milliken II*, 433 U.S. at 269; *id.* at 293 (Powell, J., concurring). In any event, it is clear that the District Court in this case has ordered the State to participate extensively in implementing desegregation remedies, in addition to bearing part of the costs, so that the State's attempt to distinguish *Milliken II* is unavailing. *See supra* pp. 5-6. The decision below is clearly consistent with *Milliken II*, and does not warrant review by this Court.

2. Contrary to the State defendants' claims, moreover, there is no conflict among the circuits justifying review by this Court. The federal courts which have considered the issue have consistently ruled that State officials who have contributed to school segregation can be ordered to help fund desegregation remedies. These decisions include rulings in the Sixth Circuit, in which, contrary to the State defendants' assertions, this principle has also been recognized. *See, e.g., Little Rock School District v. Pulaski County Special School District*, 839 F.2d 1296, 1307 (8th Cir. 1988); *United States v. Board of School Commissioners*, 677 F.2d 1185, 1186-87 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982); *Penick v. Columbus Board of Education*, 519 F. Supp. 925, 942 (S.D. Ohio), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Evans v. Buchanan*, 447 F. Supp. 982, 1038 (D. Del.), *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

No conflict warranting review is presented by the decision in the Nashville case, as to which this Court has recently denied certiorari. *See Kelley v. Metropolitan County Bd. of Ed.*, 836 F.2d 986 (6th Cir.), *cert. denied*, 108 S. Ct. 2848 (1988). In *Kelley*, a desegregation suit

originally filed in 1955, the Nashville school district filed a third-party complaint against the State of Tennessee in 1981, asking that the State be required to pay the full cost of desegregation remedies that had been ordered and implemented beginning in 1971. *Kelley, supra*, 836 F.2d at 987. Unlike this case, the State in *Kelley* had not previously been a party to the suit, and thus did not participate in the court proceedings that determined the nature, scope, and cost of the remedy. In addition, the Sixth Circuit in *Kelley* found insufficient evidence to hold that the State was a constitutional violator with respect to any remaining vestiges of segregation in Nashville, and ruled that the plaintiffs were already receiving "the full measure of relief to which they are entitled under the Constitution" without any relief from the State. *Id.* at 989-90. Indeed, none of the plaintiffs in Nashville had ever asserted a claim against the State. *Id.*

In contrast, the State has been a party to this case during the relevant liability and remedy proceedings. The claims against it have not sought to require the State defendants to pay retroactively for previous desegregation remedies years after the plaintiffs' efforts to secure them; instead, these claims have been part of plaintiffs' efforts, joined by the City Board since 1980, to obtain desegregation remedies in the first place and to implement them. In addition, the State in this case *has* been found to be a constitutional violator, and it is precisely on that basis that the courts below have ordered relief against the State defendants. Unlike *Kelley*, the orders in this case are based on the State's constitutional violations and are "part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system," as required by *Milliken II*. *Id.*, 433 U.S .at 290. The decision in *Kelley* simply does not

present a conflict with the decision in this case warranting review by this Court.

3. As this Court has recognized, it is usually appropriate to defer to the lower courts with respect to the details of implementation of desegregation remedies because of their familiarity with the "local situations coming before them" and their "proximity to local conditions." *Milliken II*, 433 U.S. at 287, n.18. The State defendants' petition offers no reason for an exception to that practice in this case. The court below ordered the State defendants to pay only certain specified costs which were "due to the presence of transfer students from outside the school district" in two suburban districts, in order to promote additional voluntary interdistrict transfers and more effective desegregation. App. at A-16. The details of the State defendants' specific objections to the particular relief ordered have already been considered by the District Court and the Court of Appeals, and may be further considered upon remand to the District Court. *See* App. at A-17. Objections to such relief on Eleventh Amendment grounds have been rejected twice by the Court of Appeals in this case, on numerous occasions by other courts, and by this Court in *Milliken II*. The State defendants' attempt to resurrect such discredited arguments fails to present an issue warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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